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## DECISION

THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-204565

DATE: March 9, 1982

MATTER OF: Stanley and Rack

## DIGEST:

1. Question whether agency acted properly in making award to FSS contractor quoting the lower total price for combined FSS and non-FSS items rather than in making award to contractor with greater degree of FSS coverage will be considered on merits under significant issue exception to timeliness standards of GAO Bid Protest Procedures.
2. Agency is not required to award procurement restricted to FSS contractors to firm with the greater degree of FSS coverage. An award made to the FSS firm offering the lower price was proper. FSS regulations merely provide that agencies shall not seek alternate sources to mandatory Federal Supply Schedules. Regulations do not provide for award to the contractor with the greater FSS coverage where FSS and non-FSS items are combined in a single award.
3. Where FSS and non-FSS items are to be awarded to a single contractor, the offeror with less FSS coverage has a possible advantage. However, the advantage is not the result of unfair action by the agency where the agency needed all the items to be awarded to a single contractor.

Stanley-Vidmar, Inc. (Stanley), protests the award of a contract for storage cabinets to Rack Engineering Company under request for quotations (RFQ) No. N62387-81-Q-03356, by the Department of the Navy, Military Sealift Command. We deny the protest.

The RFQ asked for prices on four sets of small-version, multiple-storage cabinets, with an option for three more sets. Each set included 37 different items, but the Navy needed all 37 items in a set to be of the same manufacture to insure flexible storage arrangements.

The Navy states that prior to the issuance of this RFQ on July 15, 1981, Stanley advised the Navy that it could supply storage cabinets that would satisfy the Navy's needs and that it had a Federal Supply Schedule (FSS) contract with the General Services Administration that included storage cabinets. Navy further states that since the desired cabinets were listed in the Defense Acquisition Regulation under a class of FSS items mandatory for use by the Department of Defense, the RFQ included a space for the contractor to fill in its GSA contract number for FSS coverage.

Only Stanley and Rack responded to the RFQ. The Navy found that neither offeror had all 37 items covered by its respective FSS contract. It found that Stanley had 34 of the items in its FSS contract, while Rack had 23 of the items listed in its FSS contract. As a result, each offeror had to offer some non-FSS items for each set (three non-FSS items in the case of Stanley and 14 in the case of Rack). On August 11, 1981, Navy awarded the contract to Rack because it quoted the lowest total price. (Rack's price per set was \$16,410.76, compared to \$17,904.96 for Stanley.) Stanley immediately protested this award.

Stanley contends that the Navy should not have used lowest cost as the criterion for the award, but instead should have awarded the contract to Stanley as the offeror having the greater FSS coverage for these cabinets. Stanley argues that under the Navy award method it was disadvantaged because it was bound by the prices set forth in its FSS contract on 34 of 37 items; whereas, Rack had much greater freedom to price as it saw fit, since only 23 items were listed on its FSS contract. In Stanley's view, it was penalized by the Navy for the high degree of its FSS coverage, thus undermining the FSS concept. It cites our decision B-156323, May 28, 1965, for the holding that the FSS concept should not be undermined.

Initially, Navy argues that Stanley's protest is untimely under § 21.2(b)(1) of our Bid Protest Procedures (4 C.F.R. part 21 (1981)), because Stanley should have been aware prior to submitting its quotation that price would be the only evaluation criterion for award. In Navy's opinion, Stanley is really challenging the terms of the RFQ and under our timeliness standards, such a protest was required to be filed by the protester prior to the time quotations were submitted, not thereafter. Stanley, in turn, argues that it is not challenging the solicitation, but only the Navy's method of evaluation and the award to Rack. We, however, do not deem it necessary to resolve whether Stanley's protest is timely under our Procedures because, in any event, we think the protest raises a novel issue of widespread interest concerning the use of the FSS; therefore, the protest will be considered under the significant issue exception (4 C.F.R. § 21.2(c) (1981)) of our Bid Protest Procedures.

On the merits, Navy disputes Stanley's argument that it should have disregarded Rack's lower price and selected Stanley simply because that firm had more items listed on GSA's contract. Navy argues that Stanley was disadvantaged because of its high FSS prices and not because of its greater degree of FSS coverage. As for B-156323, supra, Navy contends the cited case is inapplicable to the instant case since it involved the attempted use of a non-FSS contractor when an FSS contractor was available. Here, Navy maintains, there was no attempt to avoid the FSS and the award was made to an eligible FSS contractor.

We agree with the Navy that there was no attempt to avoid the FSS. As Navy points out, B-156323, supra, involved an unjustified award to a non-FSS contractor. In this case, award was made to an FSS contractor. The regulation cited by Stanley, 41 C.F.R. § 101-26.401(a) (1980), merely provides that agencies shall not seek alternate sources to mandatory Federal Supply Schedules. It does not provide that where FSS and non-FSS items are combined in a single procurement, award should be made to the contractor with the greater FSS coverage. We find no regulation or case which requires this result.

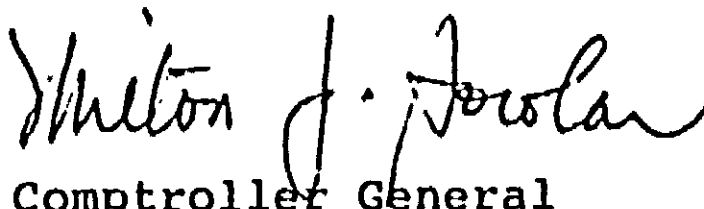
We do not consider it necessary to decide whether Stanley lost the competition because of its high degree of FSS coverage or, as argued by Navy, because its FSS prices were too high. Even if Stanley's high FSS coverage did give Rack an advantage in the competition, we do not agree with Stanley that this made the competition unfair.

The Government has no duty to eliminate a competitive advantage that an offeror may enjoy unless the advantage results from a preference or unfair action by the agency. Ensign Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34. Here, the Navy needed all the items to be of the same manufacture. While this may have given Rack a possible advantage over Stanley, it cannot be considered the result of unfair action by the Navy.

Also, we note that Stanley could have reduced its FSS prices for this competition. Of course, under the standard terms of the FSS contract, any reduction would have been applicable to all future orders of Stanley's FSS items. Dictaphone Corporation, B-193716, March 23, 1979, 79-1 CPD 200.

In view of the foregoing, we find the award was properly made to Rack based on its lower price.

Protest denied.

*for*   
Comptroller General  
of the United States